FILE COPY

Office - Supreme Court, U.S.
FILED
AUG 1 1958
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **244**

JONES BEACH STATE PARKWAY AUTHORITY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

G. FRANK DOUGHERTY, Esq.,
Attorney for Petitioner,
Jones Beach State Parkway Authority,
Office & P. O. Address,
Belmont Lake State Park,
Babylon, New York.

Of Counsel:
HODGES, REAVIS, MCGRATH & DOWNEY,
26 Broadway,
New York 4, N. Y.,
JOHN P. MCGRATH,
JEREMIAH M. EVARTS,
LEONARD M. LEIMAN,
MARTIN H. PROYECT.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement	2
Reasons for Granting the Writ	7
Conclusion	15
Appendix	17

CITATIONS

Cases:

Jefferson County v. *Tennessee Valley Authority*, 146 F. 2d 564	12
St. Agnes Cemetery v. *State of New York*, 3 N. Y. 2d 37, 143 N. E. 2d 377	14
United States v. *Des Moines County*, 148 F. 2d 448	11
United States v. *Miller*, 317 U. S. 369	6, 15
United States v. *Two Acres of Land*, 144 F 2d 207	13
United States v. *Wayne County*, 53 Ct. Cl. 417, affirmed, 252 U. S. 574	15
Westchester County Park Comm'n v. *United States*, 143 F. 2d 688	11

Statute:

New York Public Authorities Law	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

JONES BEACH STATE PARKWAY AUTHORITY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on May 14, 1958.

Opinions Below

The opinion of the District Court on a preliminary motion is reported in 147 F. Supp. 356 and appears at page 62a of Petitioner's Appendix to its brief in the Court of Appeals. The opinion of the District Court after trial is reported in 151 F. Supp. 631 and appears at page 176a of Petitioner's Appendix to its brief in the Court of

Appeals. The opinion of the Court of Appeals is not yet reported, and is appended hereto at page 17.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed is dated and was entered on May 14, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Where the United States condemns land which has been devoted to a public park use by a State, and which is perpetually restricted to that use

(a) must the "just compensation" to be paid for the taking be measured by the value of the land for park purposes as its highest and best use?

(b) did the courts below err in valuing park land on the basis of a fictitious market value based upon the property being used for residential and not park purposes?

(c) is the measure of compensation the loss to the condemnee occasioned by the taking?

Constitutional Provision Involved

The Fifth Amendment to the Constitution of the United States provides in part as follows:

> "No person shall • • • be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statement

This case involves the measure of just compensation for the taking by the United States of 51.8 acres of land

perpetually restricted to park use and held by the Petitioner, Jones Beach State Parkway Authority, on behalf of the People of the State of New York.

Jones Beach State Parkway Authority is a public benefit corporation of the State of New York created by Article 2, Title 3 of the New York Public Authorities Law. The Authority has power to acquire real estate in the name of the People of the State of New York, but only for the highway and park purposes for which the Authority was created (§158-b).

In the years 1953 and 1954, the Authority acquired 201 acres of land from the Meadowbrook Club, to be used for park purposes and for a right-of-way for the north-south parkway on Long Island known as the Meadowbrook State Parkway Extension (Pet. Ex. S. T). This land was located to the east of and adjoining the United States Air Force Base at Mitchel Field. The price paid by the Authority for the land was $6,000 per acre.

A portion of this property (120 acres) lying between the parkway and Mitchel Field was, by agreement with the United States Government, restricted in perpetuity for park usage (Pet. Ex. J.). This proceeding involves 51.8 acres of that area, condemned by the Government in September, 1955 (4a-12a)*. The land condemned lies within heavily-populated Nassau County, on Long Island, and contained 2½ holes of an excellent nine-hole golf course. The remainder of the golf course is on the land purchased from the Meadowbrook Club but not condemned by the United States. As a result of the condemnation, the entire golf course has become unusable as a golf course (104a-05a).

* All page references, unless otherwise stated, refer to Petitioner's Appendix to its brief in the Court of Appeals.

The property condemned was part of a larger area subjected to certain avigation easements granted to the Government by the Authority for the purpose of protecting flying activities at Mitchel Field (Pet. Ex. K). As they affected the property condemned, these easements gave the Government the right to fly aircraft through the air space above a "clear zone," which was an area level with the end of a runway at Mitchel Field, and above an "approach surface," which was an inclined plane starting at the edge of the clear zone farthest from Mitchel Field and rising gradually to a height of 25 feet at the point of the condemned property farthest from the clear zone. Of the total 51.8 acres condemned, 23.9 acres were in the clear zone and the remainder under the "approach surface." In addition, by agreement between the Government and the Authority, the Government could require the Authority to erect a fence around the clear zone, and no structures could be erected on the property without the Government's permission.

Both before and after the granting of the avigation easements, the property was continuously used by the public and by Air Force personnel for park and recreational purposes (94a, 132a, 135a). The following understanding as to the use of the property was reached in August, 1953: The Authority agreed to

> "restrict to park usage, an area totalling approximately 120 acres lying generally between the east boundary of Mitchel Air Force Base and the Parkway. Any recreational facilities that are provided in this area, whether for the public generally, or otherwise, will be available for use without charge, by Mitchel Air Force Base personnel and their guests." (Pet. Ex. H, par. 2g).

Subsequently, a similar provision was incorporated in the definitive agreement dated January 4, 1954 entered

into between the Authority and the Government (Pet. Ex. J, par. 2h), providing among other things for the granting of the avigation easements to the Government (par. 2g). It should be noted that this Agreement of January 4, 1954 provided that its conditions should be covenants running with the land, binding upon any subsequent purchaser or assignee (par. 3). One of those conditions was that the area between the parkway and Mitchel Field be restricted to park usage (par. 2h). Thus, the property taken could only be used as a park. Its use for any other purpose was forbidden.

On September 30, 1954, the Authority granted and delivered the avigation easements to the Government (Pet. Ex. K). The area subjected to the easements contained nine holes of the Meadowbrook Club golf course, but the easements never interfered with the use of the course (118a-19a, 124a-25a, 128a, 136a-37a). The course was in constant use by the public and Air Force personnel and golf was in fact played before and after the granting of the easements over the entire course including the 2½ holes within the taking (94a, 132a, 135a). In fact, the Government, two months after the grant of the avigation easements, actually leased the property from the Authority for recreational purposes (Pet. Ex. M).

At the trial, evidence was introduced to show the value of the property to the Authority *as a park*. This evidence included proof of the price per acre which the Authority had paid to acquire the land for that purpose only one and two years prior to the taking. When the Authority purchased the property, both the Authority and the Government knew that it would be restricted solely to park use, affording the desired protection to the Government's flying activities (64a, 84a). The price paid by the Authority for this park land was $6,000 per acre (83a; Pet. Ex. S, T).

Documentary evidence and the testimony of witnesses proved that the avigation easements did not depreciate the value of the property for park purposes (118-19a, 124a-25a, 128a, 136a-37a). The Authority's expert witnesses valued the land for park purposes at $10,500 per acre (117a, 118a, 132a, 139a). Their further testimony showed that the cost of equivalent land in the neighborhood for replacement purposes was approximately $10,500 per acre at the time of the taking (117a, 139a). The Government did not introduce evidence as to the value of the land for park use, but treated the property as if it were residential or commercial property (161a).

Despite the clear facts respecting the park use and the evidence of its value for that use, the District Court held that the land was neither acquired nor used for public park purposes (183a). The Court insisted that the property should be valued not as a park but as residential property whose value was depreciated by the avigation easements because residences could not be erected thereon (187a). The Court held the undepreciated value of the land to be $10,000 per acre to which it applied depreciation rates of 100% to 23.9 acres, 90% to 10 acres, and 80% to the remaining 17.9 acres (189a). This produced an award of $45,800 for the entire 51.8 acres, which had cost the Authority $310,800.

On appeal to the Court of Appeals, that Court accepted the proposition established by this Court in *United States* v. *Miller*, 317 U. S. 369, that "the legal concept of market value for the highest and best use of the property condemned is the generally accepted measure of just compensation." Unlike the District Court, the Court of Appeals recognized that park use might be the "highest and best use" of the property taken (*infra*, page 24). But, despite the uncontroverted evidence that the property was

acquired for park purposes, that it was restricted to park use in perpetuity and that such use was necessarily the "highest and best use", the Court of Appeals stated that, "There is no evidence here that the highest and best use of the property is for park purposes" (*infra*, page 24). Having reached this extraordinary conclusion, the Court of Appeals then affirmed the District Court's judgment, holding that the highest and best use of the property was "residential", a use to which the property could under no circumstances be devoted.

Reasons for Granting the Writ

A.

There is involved an important question of law which should be, but has not been, decided by this Court.

This is not an ordinary valuation case, where the dispute is between real estate experts on an issue of fact. Instead, this case involves a basic issue of law, which is important (1) as a source of conflict between the United States and local governmental authorities, and (2) because it involves an essential element of State government: the ability to provide park and recreational facilities for its citizens. Before this condemnation, the people of the State of New York enjoyed the use of 51.8 acres of park and recreational land. That use had been deemed important enough to justify the purchase of the land at $6,000 an acre. The United States has now deprived the people of the State of New York of this park land, compensating them at an average price of less than $885 an acre, despite the fact that comparable lands at the time of the condemnation would have cost the State at least $10,000 an acre to replace what had been taken.

The land taken was not held by a private owner, willing or able to trade it. It was not held for any commercial purpose. Park lands are not bought and sold like commercial properties, and the application of commercial valuation theories in respect to such property is therefore meaningless. Petitioner proved by competent expert witnesses the park value of the property condemned. It also established, as the best possible evidence of its value as park land, the purchase price paid by the Authority to acquire it a short time earlier for park and recreational use. And the best evidence that its value for such use was not impaired by the avigation easements, so that its value as a park was not depreciated, was its continuous use as a park as well as for golf and other recreational purposes by the public and by Air Force personnel long after the granting of the easements.

Despite the proof that park use was the highest, best and only use, and despite the proof of value for such use, both courts below treated the property as residential property, and depreciated its value by the amount that avigation easements would destroy the usefulness of the property for residential purposes. This was done even though the property, because it was restricted to park use, could not have been used to build homes, and even though the State had enjoyed the use of the land for the park and recreational purposes to which it was restricted despite the existence of the easements. Thus, we have the anomalous situation of the lower courts holding that the highest and best use for measuring just compensation was a use to which this land could, in no event, be devoted.

Moreover, in reaching this result, the Court of Appeals made the incredible statement that "no separate value of the lands for park purposes was proved" (*infra*, page 24). Taken in light of the evidence introduced by the Authority,

which valued the land "for park purposes" in the only conceivable ways such a value can ever be established, that statement of the Court of Appeals must mean that no value for park purposes can *ever* be proved, no matter what the evidence.

The potential impact of this decision is apparent; in most cases, State-owned property is not something that can be commercially valued in terms of a market, no matter how valuable it may be to the State for the State's particular use. A state capitol building or a courthouse may be worth little as commercial or residential real estate; indeed, a commercial developer would probably have to demolish the structures to make the underlying land saleable. But in those cases, the "just compensation" due the State could hardly be limited to land value.

Property used by the State as a public park has no less of a special, non-commercial governmental use than other state properties. It is just as much a public necessity as any other public facility. On condemnation by the Government, its value to the State as a park must be the determinative element of value. Here, under the restrictive covenants, the property could never be used for anything but park and recreational purposes. Legislation permitting the Authority to sell the property, referred to by the Courts below to justify their theory that this property was not necessary for park purposes, would not free the property from the covenants running with the land. It could only have been sold as a park and could only be used by any purchaser other than the Government as a park. As a matter of fact, the statute permitting a sale of the property was enacted at the request of the Authority because of negotiations for an expected sale to the Government (98a-99a).

The existence of the avigation easements in no way supports the result below. An easement or a restrictive agreement depreciates the value of property only to the extent that it interferes with the owner's enjoyment of the property when put to its highest and best use. For example, an avigation easement would not affect the value of property whose highest and best use was for subsurface mining activities. Here, too, the use to which this property was devoted was not affected by the easements or agreements with the Government. The property's "highest and best use"—indeed, its only possible use—was as a public park. Even assuming, *arguendo*, that strict enforcement of the easements and agreements with respect to the "clear zone" might prevent golf playing in that portion of the parcel, it would not prevent other park uses, such as planting and landscaping. Nevertheless, the courts below held the 23.9 acres in the clear zone to be of no value whatsoever. The remainder of the parcel, outside the clear zone, was free for any normal park use. It was nevertheless held to be 80 and 90 per cent depreciated. With respect to the entire parcel, the courts below considered not the effect of the easements and agreements on the *park* use of the property, but rather their effect on the ability to use this property for *residential* purposes.

The condemnation of property devoted to non-commercial State uses can only result in Federal-State conflict and the impairment of essential State activities if the State does not receive just compensation for the property taken. Nothing in the facts of this case requires the illogical approach to the problem taken by the courts below. This Court should grant certiorari for the purpose of establishing the proper rule for valuing non-commercial State property devoted to special public uses.

B.

The decision below is in conflict with applicable decisions of other circuits.

The only other reported instance of federal condemnation of park property is *Westchester County Park Comm'n* v. *United States*, 143 F. 2d 688 (2d Cir.), where the owner of the park argued that compensation should be based on the capitalized value of a short-term lease of the property as a parking lot. Quite properly, the Court of Appeals rejected that contention for the reason that such "rent had no bearing on the worth of the land to the County for its utilization as a park." 143 F. 2d at 692. The factual basis for valuation in that case is completely distinguishable from the basis in the case at bar because here the value of the land for its special park use has been proved. In other circuits cases have arisen involving the condemnation of properties which have the same unmarketable characteristics as parks: public ownership and lack of any basis for a "fair market value" measure of compensation. In those cases, compensation has in fact been awarded based on the special public use of the property. They are therefore in conflict with the judgment below, wherein the Court of Appeals refused to measure compensation based upon its value for the special use despite clear evidence of that value.

In *United States* v. *Des Moines County*, 148 F. 2d 448 (8th Cir. 1945), the Circuit Court of Appeals for the Eighth Circuit was faced with the question of just compensation for the taking by the United States of public roads in Des Moines County, Iowa. The United States argued that the County was entitled to nominal damages only, on the theory that there was no statutory duty to furnish substitute roads. The Circuit Court held, however, that the County was entitled to the monetary loss caused

by the taking, which in that case was the cost of constructing substitute road facilities. The Circuit Court further found it immaterial whether the replacement of the road system was a legal obligation "or one which arises from necessity," saying (148 F. 2d. at 449):

> "The United States contends that the appellees can in no event recover more than nominal damages, because the statutes of Iowa do not impose upon the appellees an enforceable duty to furnish substitute roads. We do not agree. Nothing can be gained by a discussion of the statutes of Iowa relating to roads. If the taking by the United States of the roads in suit necessitates the building or improvement of other roads, they will have to be built or improved by the appellees out of state funds unless the United States pays the expense. We have no doubt of the existence of the duty of the appellees to provide for a necessary readjustment of their road system. Whether the duty is express or implied or one which arises from necessity, we regard as of no legal consequence."

Similarly, the Circuit Court of Appeals for the Sixth Circuit has adopted a rule, which, if applied to the case at bar, would have required a judgment for the State based on a replacement cost of $10,000 an acre. In *Jefferson County v. Tennessee Valley Authority*, 146 F. 2d 564 (6th Cir. 1945), the United States flooded 95 miles of the County's highway system. The Court, in reaching a measure of just compensation based upon the loss to the County, said (146 F. 2d at 565-66):

> "* * * The political subdivision cannot deal in its roads and highways as a private corporation and thus when such property is taken by the power of the Federal Government, just compensation cannot be measured by the same standards as compensation for the taking of purely private property."
>
> * * *

"Appellant insists that the true measure of 'just compensation' for the taking of such property is the cost of restoring the property to the same condition after the taking as it was before. This contention is untenable as the roads in question here cannot be replaced. The practicable view is to consider the road and highway needs of the civil division affected by the taking and to allow the governmental unit such sum in damages as will pay the cost of road facilities equal in utility to those destroyed. Appellant did not have title to property susceptible to the ascertainment of fair cash value. In fact, viewing the county as an entity separate from its inhabitants, the construction and maintenance of highways was a burden, although a necessary one. * * * The constitutional phrase 'just compensation' means a full and perfect equivalent for the property taken. Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 326, 13 S. Ct. 622, 37 L. Ed. 463. Just compensation rests on equitable principles and means substantially that the owner should be put in as good position as he would have been if his property had not been taken or as nearly so as is possible under the given circumstances. * * *"

The judgment below is also in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States* v. *Two Acres of Land*, 144 F. 2d 207 (7th Cir. 1944). There the property condemned was a church. Although a church is not publicly owned, it has the same essential characteristics of public property: it is not a commodity frequently traded, for which a market price can be established, and it is not a profit-making enterprise whose earnings can be capitalized. In affirming the District Court, the Court of Appeals held that the measure of compensation was not to be based upon any market price (144 F. 2d at 209):

> "* * * In the case of nonprofit, religious or service properties, cost of replacement is regarded as cogent evidence of value although not in itself the only standard of compensation. But people do not go about buying and selling country churches. Such buildings have no established market value. Consideration must be given to the elements actually involved and resort had to any evidence available, to prove value, such as the use made of the property and the right to enjoy it. * * *"

The above three cases from the Sixth, Seventh and Eighth Circuits are in absolute and irreconcilable conflict with the judgment below. In those cases, as in the case at bar, the property had no market value for the use to which it was put at the time of the taking. In those cases, as in the case at bar, there were no earnings to capitalize as a measure of value. In each case, *except* the case at bar, the court, in deciding the issue of just compensation, took into account the special purpose for which the property was used, and measured compensation as the loss to the condemnee for that special purpose. In no case, *except* the case at bar, did the Court base its valuation upon a fictitious use of the property taken, a use to which the property was not and could not be devoted by the State.

The only conclusion possible from these cases is that, had this park property been located in the Sixth, Seventh, or Eighth Circuit, the result would have been different. It is also significant that the New York Court of Appeals in the recent case of *St. Agnes Cemetery* v. *State of New York*, 3 N. Y. 2d 37, 143 N. E. 2d 377 (1957) held that just compensation for property taken from a cemetery

should be its special value for cemetery purposes as its highest and best use. Thus, the judgment below conflicts also with the rule adopted by the highest court of New York State. See also *United States* v. *Wayne County*, 53 Ct. Cl. 417, *affirmed*, 252 U. S. 574.

It is respectfully submitted that the true rule for valuation of property devoted to a special use was established by this Court in *United States* v. *Miller*, 317 U. S. 369, 374 where the Court said, "Where, for any reason, property has no market, resort must be had to other data to ascertain its value; * * *." In the case at bar, Judge Gaiston, on a preliminary motion, recognized the applicability of this principle to park property (147 F. Supp. 356). It was gross error for the Courts below to ignore the proof of value of the property for its park use its highest, best and only possible use.

Conclusion

Our federal system requires a fair solution of disputes between the Federal Government and the States. The system functions improperly if, in settling disputes arising out of the taking of State property, one rule is followed in one circuit and a different rule in other circuits and also in the courts of the State in which the property lies. The federal system functions improperly when the Federal Government is permitted to take State property without providing an adequate measure of compensation based upon the special use of the State's property, thereby

impairing the ability of the State to provide essential public services.

For the reasons above stated, it is respectfully requested that this Court grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

G. Frank Dougherty, Esq.,
Attorney for Petitioner,
Jones Beach State Parkway Authority.
Office & P. O. Address,
Belmont Lake State Park,
Babylon, New York.

Of Counsel:
Hodges, Reavis, McGrath & Downey,
26 Broadway,
New York 4, N. Y.
John P. McGrath,
Jeremiah M. Evarts,
Leonard M. Leiman,
Martin H. Proyect.

Dated: August 1, 1958

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 222—October Term, 1957.

(Argued March 13, 1958. Decided May 14, 1958.)

Docket No. 24753

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Jones Beach State Parkway Authority, 51.8 ACRES OF LAND, MORE OR LESS, situate in the Town of Hempstead, Nassau County, State of New York; and Town of Hempstead, County of Nassau, The People of the State of New York and Unknown Owners,
Defendants-Appellants.

Before:

CLARK, *Chief Judge,*
HINCKS, *Circuit Judge* and BRENNAN, *District Judge.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Robert A. Inch, *Chief Judge,* fixing just compensation for the taking

in condemnation of the fee title to 51.8 acres of land. Reported below 151 F. Supp. 631. Affirmed.

PERRY W. MORTON, Assistant Attorney General, *Attorney for Appellee*, Harry T. Dolan, Special Assistant to the Attorney General (of Counsel), Roger P. Marquis, Edward S. Lazowska, Attorneys, Department of Justice, Washington, D. C., on brief.

G. FRANK DOUGHERTY, *Attorney for Appellant, Jones Beach State Parkway Authority*, Babylon, New York, John P. McGrath (of Counsel), Jeremiah M. Evarts, Martin H. Proyect, Attorneys on brief.

BRENNAN, *District Judge*:

The appellant challenges on this appeal the principle of law upon which the value of the land, taken in condemnation, was determined and the amounts ultimately found to constitute just compensation therefor. The background of facts are set out in detail in the opinion below (*U. S. v. 51.8 Acres of Land, etc.*, 151 F. Supp. 631) and will be briefly referred to.

The lands involved constitute an irregular shaped parcel adjoining a United States Air Force facility located in the Town of Hempstead, N. Y. and generally known as Mitchel Field. The parcel is so located so as to embrace in whole or in part a prolongation of two of the principal runways of the existing installation. At the time of the taking, the lands were burdened with restrictive covenants imposed thereon and easements granted to the United

States, designed to facilitate the use of Mitchel Field and to guard against accident and damage to aircraft and personnel from unforeseen accident in the use of said runways. By reason of the above restrictive provisions and easements, it may also be said that they were intended to avoid injury to persons who might be present upon the land and damage to property which might be located thereon. The evaluation of the lands, burdened as above, creates the problem involved in this litigation.

The owner of the fee of the lands taken is the Jones Beach State Parkway Authority, an agency of the State of New York, which, for convenience, will be referred to herein as the "State." The appellee will be referred to herein as the "Government."

A considerable portion of the trial record is taken up with evidence relative to the historical background of facts which brought about the imposition of the easements, above referred to. It is sufficient for our purpose to say that the easements under discussion were the result of negotiations between the State and the Government, beginning in 1952 and terminating in 1954. The negotiations were based upon the evident desire or necessity for both the State and the Government to obtain rights in or over certain property located in the vicinity of Mitchel Field. The State desired the right to locate a part of the highway, known as the Meadowbrook Highway Extension, over a portion of government-owned property. The Government desired to obtain interest in the property located on the east side of Mitchel Field which would provide additional protection to the runway aproaches.

The negotiations terminated in a contract dated January 4, 1954, according to the terms of which the State was granted an easement to construct the highway, above men-

tioned, over approximately 54 acres of government property. The land in question (with other lands) was to be acquired by the State and burdened with the restrictions and easements above referred to. The agreement was carried out according to its terms. An easement was granted by the Government, permitting the construction and maintenance of the Parkway Extension. The State purchased the lands in question from the Meadowbrook Club and, by the appropriate instruments, same was burdened in perpetuity with restrictive convenants, a drainage easement and an "avigation easement" for the benefit of the Government. The Government's rights in the lands involved here are stated below.

The avigation easement may best be described as providing for the uninterrupted flight of aircraft over what is termed a "clear zone" and an "approach zone." The clear zone embraced that part of the lands taken, adjacent to Mitchel Field and included in a rectangular area, in depth being a distance of 1000 feet, measured from the end of the runways and extending 750 feet on each side of the extended center line of the runway. This area comprised 23.9 acres of the total parcel. In effect, the use of the air space from the surface level and extending upward without limitation over the clear area was granted to the Government.

The remaining 27.9 acres of land taken was located entirely within the approach zone. The approach zone represented a defined area adjacent to that side of the clear zone which was farthest distant from Mitchel Field. The easement granted provided for the free and unobstructed passage of aircraft through the air space above it. The course of such passage began at the land level at the point where the clear zone joined the approach zone and rose

generally from zero to 25 feet at the edge of the parcel farthest from the limits of Mitchel Field. The flight angle or glide path inclined upward one foot vertically for each 50 feet horizontally.

Unquestioned on this appeal is a summary of the court below of the encumbrances and restrictions as to the use and future utility of the lands taken, as follows:

> "(a) the entire area was encumbered by the aviga-tion easement of September 30, 1954 (Govt. Exh. 13), which granted the free and unobstructed flight of aircraft within the adjacent and lower elevations of the airspace; as hereinbefore described. (b) The entire area of the land was restricted as to any obstruction of whatsoever nature in the clear zone area (23.9 acres), and which might intrude into the clearance surface in the approach zone (zero to 25'), comprising the remaining 27.9 acres. (c) No buildings or structures could be erected within the entire area. (d) The cost of removing obstructions and/or keeping the area clear of ob-structions was assumed by the State or its succes-sor in title. (e) All taxes or assessments levied on the land were obligations assumed by the State or its successor in title. (f) The clear zone area (23.9 acres) could be sealed off by a security fence, at State expense, from the State's remaining lands. (g) The central portion of the tract was subject to a permanent drainage pipe line easement extend-ing from the westerly to the easterly boundaries. (h) All the covenants in the agreement of January 4, 1954 (Def. Exh. J) were deemed to be covenants running with the land and binding on the State or its grantees, successors or assigns."

The determination of "just compensation," as required by the Fifth Amendment was made by the Court after the receipt of evidence. The evidence offered by both parties

was directed to show (a) the fair market value of the lands taken, considering same as unencumbered by the easements and (b) the percentage by which the unencumbered valuation was reduced or depreciated by reason of said existing restrictions and easements. The owner's pecuniary loss, representing the market value of the premises, was thereby determined.

The testimony of the expert witnesses as to valuation produced no significant disagreement. The witnesses for the State placed the valuation at $10,500. per acre. The Government witness testified as to a valuation of $9,000. per acre. The Court found that the unencumbered valuation of the land was $10,000. per acre. The witnesses for both litigants based their testimony on comparable sales of property, zoned for residential purposes, in the vicinity of the area involved. Although the State's witnesses indicate that such valuation represented a value for park purposes, it is plain that both parties recognized that residential purposes was the highest and most profitable use for which the property was adaptable.

The matter of the depreciating effect of the burdens imposed upon the value of the lands condemned, is the crux of the controversy here. The State's witnesses in substance testified that they in no way depreciated the value of the lands taken. The Government's witness testified to the effect that over half of the lands were depreciated so as to have no market value and that the remaining portion was depreciated by 80% of its unencumbered value by reason thereof. The contention is stated by the Court below as follows: "The State desires the Court to value this land as 'unencumbered' on the basis of 'market value' and as 'encumbered' on the basis of 'park value' and with no depreciation attributable to the encumbrances."

(151 F. Supp. 631 at 636.) The trial court rejected the contention and refused to hold that under the circumstances, shown here, market value and park value were capable of actual distinction. Reference is made however in the Court below that in determining the effect of the easement any valuable use of the land was considered. The Court states at pages 634-635 "* * * it would appear that the utility and value of this land to any prospective purchaser, *for any conceivable use,* has been severely impaired, if not totally destroyed." (Emphasis supplied.)

The legal concept of market value for the highest and best use of the property condemned is the generally accepted measure of just compensation. (*U. S.* v. *Miller,* 317 U. S. 369 at 374.) An additional value to the owner, because of the use to which his land is devoted, is not generally recognized as an element of market value. (*U. S.* v. *Petty Motor Co.,* 327 U. S. 373 at 377; *Olson* v. *U. S.,* 292 U. S. 246 at 255). That the above principles are not inflexible is recognized. (*U. S.* v. *Miller, supra.*) It is described in *State of Nebraska* v. *U. S.,* C. A. 8, 164 F. 2d 866 at 869 as a rule that is not "autocratically absolute." The concept is flexible enough to lend itself to adaptation to the circumstances of a particular case in order to determine the money value of what the "owner has lost." (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189 at 195.) Familiar examples are the taking of public highway, utility facilities and leasehold interests. The New York Court of Appeals in *St. Agnes Cemetery* v. *State of N. Y.,* 2 N. Y. 2d 37 held that under the circumstances existing that land restricted to cemetery uses should be valued for that use since it was the highest and best use of the property taken. This decision is not a variation of the rule but is rather a reiteration of the highest and best use

doctrine with an evaluation based upon such use. In fact, this court in *Westchester County Park Commission* v. *U. S.*, C. A. 2, 143 F. 2d 688, cert. denied 323 U. S. 726, intimated that the best use evaluation might apply to park lands under certain circumstances supported by evidence of a higher value by reason of a restriction to park purposes.

The State's contention that the lands here must be evaluated upon the basis of the restricted use thereof for park purposes fails for the same reasons a similar contention failed in the *Westchester Commission* case. There is no evidence here that the highest and best use of the property is for park purposes. The State's own evidence of value disputes the contention. No separate value of the lands for park purposes was proved. In fact, residential use and comparable sales of property zoned for residential purposes were the bases of all expert testimony. In the above particular, the *Westchester Commission* case is stronger than the case here.

The actual grievance of the State on this appeal is not directed to the unencumbered valuation of the property but it is directed to the contention that the depreciation allowed by reason of the easements and restrictions should have been applied to the lands considered as dedicated to park purposes. A short answer is that there was no evidence of valuation of the land for park purposes as such, from which the depreciation due to the easements and restrictions could be deducted. If we look further into the record, we find that the lands were not considered essential for park purposes and not held by the State as such since authority for their sale had been granted and an offer to sell same to the Government at a sum very much lower than their unencumbered value had been made.

Finally a reading of the opinion below shows that the trial court did consider the availability of the encumbered lands for park and recreational purposes. Likewise the expert witness for the Government in his testimony evaluated the depreciating effect of the restrictions and easements as applied to lands used for both residential and park purposes. The *Westchester Commission* case is again more favorable to the State since such evidence was lacking therein. The Court in that case rejected a contention similar to that advanced by the State here. The record permits no different result.

The ultimate findings of value made by the trial court are not lightly open to reappraisal on appeal. (Federal Rules of Civil Procedure 71 and 52.) Even if we would have arrived at a different result, based upon the trial record, we may not substitute our judgment for that of the trier of the facts in the absence of clear error. We find none here. Substantial evidence, supporting the findings, is found in the record, the opinion indicates considered appraisal and application thereof, the award is within the range of the evidence, the result is therefore not open to attack. (*Phillips* v. *U. S.*, C. A. 2, 148 F. 2d 714; *U. S.* v. *Lambert*, C. A. 2, 146 F. 2d 469; *U. S.* v. *Delano Park Homes*, C. A. 2, 146 F. 2d 473.)

The claim for severance damages has not been overlooked. It arises by reason of the fact that two holes of a nine hole golf course were located within the clear zone area. The use of that area was so completely foreclosed by encumbrances, especially the provision for sealing off that area by a security fence, as to render the claim without basis.

Affirmed.

Appendix

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of May one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. CARROLL C. HINCKS,
Circuit Judge,
HON. STEPHEN W. BRENNAN,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

51.8 Acres of Land, more or less, in the Town of Hempstead, County of Nassau, State of New York and the People of the State of New York, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk